Supreme Court, U.S.
FILED
MAR 11 2015
OFFICE OF THE CLERK

No. 14-144

In the Supreme Court of the United States

JOHN WALKER III, IN HIS OFFICIAL CAPACITY AS CHAIRMAN OF THE BOARD, ET AL., PETITIONERS

v.

TEXAS DIVISION, SONS OF CONFEDERATE VETERANS, INC., ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

REPLY BRIEF FOR THE PETITIONERS

KEN PAXTON
Attorney General of Texas

CHARLES E. ROY
First Assistant Attorney General

OFFICE OF THE ATTORNEY GENERAL
P.O. Box 12548 (MC 059)
Austin, Texas 78711-2548
scott.keller@texasattorneygeneral.gov
(512) 936-1700

SCOTT A. KELLER
Solicitor General
Counsel of Record

J. CAMPBELL BARKER
Deputy Solicitor General

BILL DAVIS
EVAN S. GREENE
ALEX POTAPOV
Assistant Solicitors General

ERIKA M. KANE
Assistant Attorney General

TABLE OF CONTENTS

Table of Authorities ii

Argument 2

I. The Content Of Texas License Plates Is Government Speech 2

A. The Department's Sole Control Over The Content Of License Plates Is Dispositive 2

B. The Respondents Analyze Extraneous Factors 5

C. The Respondents' And Amici's Efforts To Avoid The Government-Speech Doctrine Fail 12

D. The Respondents Cannot Compel The State To Speak 17

II. The Board Did Not Engage in Viewpoint Discrimination 20

Conclusion 22

TABLE OF AUTHORITIES

Cases

Ark. Educ. Television Comm'n v. Forbes,
523 U.S. 666 (1998) 14, 15

Borough of Duryea v. Guarnieri,
131 S. Ct. 2488 (2011) 8

Choose Life Ill., Inc. v. White,
547 F.3d 853 (7th Cir. 2008) 20, 21

Hazelwood Sch. Dist. v. Kuhlmeier,
484 U.S. 260 (1988) 13

Johanns v. Livestock Mktg. Ass'n,
544 U.S. 550 (2005) ..... *passim*

Lee v. Weisman,
505 U.S. 577 (1992) 17

Legal Servs. Corp. v. Velazquez,
531 U.S. 533 (2001) 2, 3, 5, 14

Lehman v. City of Shaker Heights,
418 U.S. 298 (1974) 6, 20

Mayor of Phila. v. Educ. Equal. League,
415 U.S. 605 (1974) 11

Nat'l Endowment for the Arts v. Finley,
524 U.S. 569 (1998) 14

Perry v. McDonald,
280 F.3d 159 (2d Cir. 2001) 21

Pleasant Grove City v. Summum,
555 U.S. 460 (2009) ..... *passim*

Rosenberger v. Rector & Visitors of the Univ. of Va.,
515 U.S. 819 (1995) 3

Rust v. Sullivan,
500 U.S. 173 (1991) 3, 5, 13, 18

Santa Fe ISD v. Doe,
530 U.S. 290 (2000) 17

Simon & Schuster, Inc. v. Members of the N.Y. State Crime Victims Bd.,
502 U.S. 105 (1991) 20

Snyder v. Phelps,
131 S. Ct. 1207 (2011) 20

Sons of Confederate Veterans, Inc. v. Comm'r of Va. Dep't of Motor Vehicles,
288 F.3d 610 (4th Cir. 2002) 21

Stop the Beach Renourishment, Inc. v. Fla. Dep't of Envtl. Prot.,
560 U.S. 702 (2010) 11

Town of Greece v. Galloway,
134 S. Ct. 1811 (2014) 17

United States v. Am. Library Ass'n,
539 U.S. 194 (2003) 14

United States v. Kokinda,
497 U.S. 720 (1990) 21

Wooley v. Maynard,
430 U.S. 705 (1977) 18, 19

Statutes and Rules

39 U.S.C. § 416 16

39 C.F.R. §§ 551.1–551.8 16

Fed. R. Evid. 201(b) 19

Tex. Transp. Code § 504.002(3) 3

Tex. Transp. Code § 504.005(a) 1, 3, 8

Tex. Transp. Code § 504.007(a)(3) 3

Tex. Transp. Code § 504.008(g)–(h) 3

Tex. Transp. Code § 504.602(a) 8

Tex. Transp. Code § 504.608 12

Tex. Transp. Code § 504.801(c) 3, 4, 8

Tex. Transp. Code § 504.801(e) 15

Tex. Transp. Code § 504.851(f)–(g) 3

Tex. Transp. Code § 504.851(h) 4

Tex. Transp. Code § 504.901(b)–(c) 3

Tex. Transp. Code § 504.943 7

43 Tex. Admin. Code § 12.3 16

43 Tex. Admin. Code § 217.22(c)(4)(B) 4

43 Tex. Admin. Code § 217.28(c)(7)(C)(ii) 4

43 Tex. Admin. Code § 217.28(d)(3)(A) 6

43 Tex. Admin. Code § 217.28(d)(3)(B) 6

43 Tex. Admin. Code § 217.28(i)(5)(B) 4

43 Tex. Admin. Code § 217.28(i)(5)(B)(iii) 4
43 Tex. Admin. Code § 217.28(i)(6) 12
43 Tex. Admin. Code § 217.28(i)(7) 3, 12
43 Tex. Admin. Code § 217.28(i)(7)(A) 4
43 Tex. Admin. Code § 217.28(i)(8)(B) 3
43 Tex. Admin. Code § 217.40(d)(2) 12
43 Tex. Admin. Code § 217.40(e) 12
43 Tex. Admin. Code § 217.40(e)(3)(B) 3

Other Authorities

Act of May 19, 2009, 81st Leg., R.S., ch. 933, 2009 Tex. Gen. Laws 2485 9

Robert Arnold, *Texas Personal License Plates: What's Considered Road Worthy?*, KPRC TV 2 Houston, http://www.click2houston.com/news/Texas-personal-license-plates-What-s-considered-road-worthy/18441360 10

Brief of Amicus Curiae City of N.Y., *Pleasant Grove City v. Summum*, 555 U.S. 460 (June 23, 2008) (No. 07-665), 2008 WL 2521268 9

Brief of Amicus Curiae State of Texas, et al., *Santa Fe ISD v. Doe*, 530 U.S. 290 (Dec. 30, 1999) (No. 99-62), 1999 WL 1272942 16–17

Brief of the State of Texas as Amicus Curiae, *Schultz v. Medina Valley ISD*, No. 11-50486 (5th Cir. June 2, 2011) 17

Scott W. Gaylord, *"Kill the Sea Turtles" and Other Things You Can't Make the Government Say*, 71 Wash. & Lee L. Rev. 93 (2014) 7, 14

Order, *Schultz v. Medina Valley ISD*, No. 11-50486 (5th Cir. June 3, 2011) 17

Texas Capitol Gift Shop, Six Flags Over Texas Desk Set, http://www.texascapitolgiftshop.com/Six-Flags-Over-Texas-Desk-Set-P253.aspx 19

Texas Dep't of Transp., *Adopt-a-Highway*, http://txdot.gov/inside-txdot/get-involved/volunteer/adopt-a-highway.html 16

Tr. of Tex. DMV Bd. Meeting, Aug. 9, 2012, http://www.txdmv.gov/reports-and-data/doc_download/450-2012-trans-aug9 10

U.S. Postal Serv., *The Stamp Selection Process*, https://about.usps.com/who-we-are/csac/process.htm 16

No. 14-144

In the Supreme Court of the United States

JOHN WALKER III, IN HIS OFFICIAL CAPACITY AS CHAIRMAN OF THE BOARD, ET AL., PETITIONERS

v.

TEXAS DIVISION, SONS OF CONFEDERATE VETERANS, INC., ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

REPLY BRIEF FOR THE PETITIONERS

The Texas Department of Motor Vehicles has "sole control" over what appears on a Texas license plate. Tex. Transp. Code § 504.005(a). Texas specialty license plates are therefore government speech under *Pleasant Grove City v. Summum*, 555 U.S. 460, 473 (2009), and *Johanns v. Livestock Marketing Association*, 544 U.S. 550, 560–61 (2005), which held that the government speaks when it "effectively control[s]" messages by exercising "final approval authority." On each license plate, Texas communicates a message within its sole control, and consenting motorists assist in spreading that state-approved speech.

Texas has not abridged any "traditional free speech rights," *Summum*, 555 U.S. at 474, by using license plates to communicate these messages. The respondents do not

dispute that they remain free to display the confederate battle flag on their vehicles in more prominent ways: from bumper stickers to window decals to car-sized paint jobs. What they cannot do is compel Texas to speak or to place its imprimatur on the confederate battle flag.

Untenable consequences would follow if a viewpoint-neutrality requirement is imposed on States that retain sole control over messages on their license plates. States that issue Fight Terrorism or World War II Veteran plates should not be compelled to print license plates approving of al Qaeda or the Nazi party. Texas has maintained sole control of its license plates and propagates only messages that it approves. Texas license plates are therefore government speech that private parties cannot co-opt.

ARGUMENT

I. THE CONTENT OF TEXAS LICENSE PLATES IS GOVERNMENT SPEECH

A. The Department's Sole Control Over The Content Of License Plates Is Dispositive

1. *Summum* and *Johanns* established a straightforward test to determine whether the government-speech doctrine applies: Has the government "effectively controlled" the message by exercising "final approval authority" over it? *Summum*, 555 U.S. at 473 (quoting *Johanns*, 544 U.S. at 560–61). If so, the message is a "form of government speech" immune from viewpoint-neutrality requirements. *Id.* at 464.

The doctrine applies even if private parties are used to deliver the speech. *Id.* at 468, 471; *Johanns*, 544 U.S. at 560, 562. As *Legal Services Corp. v. Velazquez* explains,

"the government [may] 'use[] private speakers to transmit specific information pertaining to its own program.'" 531 U.S. 533, 541 (2001) (quoting *Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819, 833 (1995)); *see Rosenberger*, 515 U.S. at 833 (confirming that a government may "regulate the content of what is or is not expressed when it is the speaker or when it enlists private entities to convey its own message") (citing *Rust v. Sullivan*, 500 U.S. 173, 194 (1991)).

Government speech may even be financed by private sources. *Summum*, 555 U.S. at 464; *Johanns*, 544 U.S. at 562–67. And the government need not undertake any particular "formal process" publicly embracing the message. *Summum*, 555 U.S. at 473. What matters is whether the government has retained ultimate control over the message. *Ibid.*

2. Contrary to the respondents' contentions, *see* Resp. Br. 15, 18, 21, Texas has total control over the speech here. The Texas Department of Motor Vehicles "has *sole control* over the design, typeface, color, and alphanumeric pattern for all license plates." Tex. Transp. Code § 504.005(a) (emphasis added). And the Department's Board retains "*final approval authority* of all specialty license plate designs." 43 Tex. Admin. Code § 217.28(i)(8)(B) (emphasis added); *see id.* §§ 217.28(i)(7), 217.40(e)(3)(B); *see also* Tex. Transp. Code § 504.801(c) (directing the Department to "design each new specialty license plate in consultation with the sponsor"); *id.* §§ 504.002(3), 504.007(a)(3), 504.008(g)–(h), 504.851(f)–(g), 504.901(b)–(c) (reflecting that the State owns the design and color combination for each approved license plate and controls the transfer and disposition of plates after their issuance).

Accordingly, the Department has discretion to reject a requested design based on any information it has about the license plate. "The department may refuse to create a new specialty license plate if the design might be offensive to any member of the public," but it may also reject a plate "*for any other reason established by rule*." Tex. Transp. Code § 504.801(c) (emphasis added). In particular, the Board may deny a specialty plate based on "the proposed license plate design." 43 Tex. Admin. Code § 217.28(i)(5)(B). That broad prerogative includes denials based on any "information provided during the application process." *Id.* § 217.28(i)(5)(B)(iii); *see id.* § 217.28(i)(7)(A) (stating that the Board may disapprove a specialty plate "based on all of the information provided" to the Board).

The State's authority to control license plates extends to plates marketed and sold through private vendors to which the State has outsourced that responsibility, as well as to personalized plates. *See* Tex. Transp. Code § 504.851(h); 43 Tex. Admin. Code §§ 217.22(c)(4)(B), 217.28(c)(7)(C)(ii). The respondents' argument that "[t]he act of speaking [on license plates] is . . . entirely controlled by the driver," Resp. Br. 14, ignores Texas's statutory and regulatory scheme. Amici similarly ignore the extent of Texas's control over messages transmitted through the program. *See* ACLU Br. 15, 25 & n.20; Becket Fund Br. 9; Children First Foundation Br. 14–15; ACLJ Br. 11.

In short, Texas easily satisfies the "effective control" and "final approval authority" standards established by *Summum* and *Johanns*. The content of Texas license

plates is therefore government speech, and Texas consequently has no obligation to maintain viewpoint neutrality in deciding whether or how to speak on its license plates.

B. The Respondents Analyze Extraneous Factors

1. In light of *Summum*, *Johanns*, and the Department's control over Texas's license-plate program, it is unsurprising that the respondents attempt to add elements to the government-speech analysis. But *Johanns* rejects the extra elements that the respondents claim *Summum* adds—and vice versa.

a. Permanence is not part of the test. *Cf.* Resp. Br. 17. After all, *Johanns* found television advertisements to be government speech. 544 U.S. at 554–55, 562. Limiting the doctrine to permanent structures also makes no sense. Surely the respondents would concede that a presidential press conference constitutes government speech, irrespective of its transient nature. *See, e.g.*, *Legal Servs. Corp.*, 531 U.S. at 540 (noting that "the counseling activities" of the doctors in *Rust* "amounted to governmental speech").

Summum examined the permanence of monuments because it was necessary to explain why forum analysis was inappropriate in that case, despite the fact that parks are traditional public forums for other (more transient) forms of private speech. *Summum*, 555 U.S. at 464. Indeed, the respondents and various amici effectively concede that permanence on the level of a park monument is not generally required, as they acknowledge that license plates approved by a State Legislature may constitute government speech. Resp. Br. 29; Choose Life Br. 9 & n.5, 18; Children First Br. 16–17, 25; ACLJ Br. 11–12.

Moreover, even if the respondents' permanence analysis were apt and a year's worth of speech were somehow insufficiently permanent to constitute government speech, the Department provides automatic annual renewal notices for specialty license plates. 43 Tex. Admin. Code § 217.28(d)(3)(A). The owner need only pay a fee and submit any required paperwork to remain in the program. *Id.* § 217.28(d)(3)(B).

License plates are thus more like a monument that "endures" than a demonstration or a temporary installation. *See Summum*, 555 U.S. at 478–80; *see also Lehman v. City of Shaker Heights*, 418 U.S. 298, 302 (1974) (plurality op.) ("[V]iewers of billboards and streetcar signs [have] no choice or volition [but] to observe such advertising .... The radio can be turned off, but not so the billboard or street car placard.") (internal quotation marks omitted); *id.* at 305–08 (Douglas, J., concurring in the judgment). Like monuments and billboards, license plates convey speech that is fixed on a tangible medium for a lengthy duration and is presented in a manner that viewers cannot easily avoid.

b. There is also no requirement that government speech be closely identified with the government. *Cf.* Resp. Br. 17–18. *Johanns* makes clear that the government does not have to identify itself as the speaker in order to avail itself of the government-speech doctrine. 544 U.S. at 563–64 & n.7. "Close identification" is but another way of describing the reasonable-observer test, which was endorsed by only one Justice in *Summum*. 555 U.S. at 487 (Souter, J., concurring in the judgment); *see* Pet. Br. 27–32; Justice and Freedom Fund Br. 13–16; Ohio Br. 15–28; Berger Br. 19–25. Whether speech is closely identified

with the government is simply a factor that may (or may not) suggest that the government controls the speech at issue.

In any event, States are very much identified with any expression on their license plates. *See* Berger Br. 11–12 n.3. The reason cars must bear license plates is to comply with a state regulatory program that assigns to each vehicle unique identification that can be created only by the State. Tex. Transp. Code § 504.943. Hence, Texas places its name and the outline of the State on each license plate. *See* J.A. 29. These labels would satisfy even the disclosure standard for government speech set forth in the *Johanns* dissent. *See* 544 U.S. at 571–72 (Souter, J., dissenting) ("Sometimes . . . government can make an effective disclosure only by explicitly labeling the speech as its own.").

There is a clear line of demarcation between a license plate and a license-plate holder or a bumper sticker: only the plate is closely identified with the State. *Cf.* Resp. Br. 24. The license plate is an indivisible whole; it is not an assembly of different parts, nor is there any coherent or administrable way to conceive of it as having discrete parts. And the words and pictures that appear on license plates have long been used to shape the image of States in the mind of the public. *See* Scott W. Gaylord, *"Kill the Sea Turtles" and Other Things You Can't Make the Government Say*, 71 Wash. & Lee L. Rev. 93, 143, 149 (2014); *cf.* Resp. Br. 19, 23.

c. The respondents incorrectly assert that messages on license plates are not Texas's "'from beginning to end'" because these messages are purportedly "designed by private individuals" and "published by drivers." Resp. Br. 20, 21 (quoting *Johanns*, 544 U.S. at 560). The statutory

authority to design license plates, though, rests with the Department, Tex. Transp. Code § 504.801(c), and Texas has "sole control" over whether a plate will be created, *id.* § 504.005(a). There is, of course, a range of possible ways in which a private citizen can petition or encourage the government to speak. *Cf. Borough of Duryea v. Guarnieri*, 131 S. Ct. 2488, 2495 (2011) ("The right to petition allows citizens to express their ideas, hopes, and concerns to their government"). Texas law allows private citizens to present proposed plates and consult with the government as it designs those plates. *E.g.*, Tex. Transp. Code § 504.602(a) ("The department shall design [Keep Texas Beautiful] license plates in consultation with Keep Texas Beautiful, Inc."). But none of these formal avenues for private input diminishes the State's control over the speech.

The respondents offer an overly narrow reading of *Johanns*, as the Court there found government speech even though the government was not directly involved in each step of creating the message. 544 U.S. at 560 (noting that "[t]he Secretary of Agriculture does not write ad copy himself"). If there were any doubt, *Summum* rebuts the notion that the government must generate a speech concept and oversee its creation at each step. The monuments in *Summum* constituted government speech even though they were created and donated by private parties. 555 U.S. at 464–65.

d. The respondents also wrongly suggest that government speech must necessarily convey a "singular 'programmatic message.'" Resp. Br. 9. The park in *Summum* included a historic granary, a wishing well, the city's first fire station, a September 11 monument, and a Ten Commandments display—all of which constituted government

speech. 555 U.S. at 464–65. Similarly, *Summum* indicated that the various structures in New York's Central Park are government speech, *id.* at 472, 474–75, and "[t]here are 52 fountains, monuments, and sculptures in Central Park," Brief of Amicus Curiae City of N.Y. at 2, *Pleasant Grove City v. Summum*, 555 U.S. 460 (June 23, 2008) (No. 07-665), 2008 WL 2521268. These features include sculptures depicting Alice in Wonderland, Teddy Roosevelt, Shakespeare, the Pilgrims, the Civil War, and a 1925 dog-sled race. *Ibid.* It is hard to perceive a singular programmatic message there.

2. The respondents also attempt to avoid *Summum* and *Johanns* by asking the Court to consider two more extraneous factors: how frequently license-plate proposals have been rejected in the past, and which entity within Texas's government makes the approval decisions.

a. The respondents repeatedly suggest that the Board, which was not given authority over specialty-plate applications until 2009, *see* Act of May 19, 2009, 81st Leg., R.S., ch. 933, 2009 Tex. Gen. Laws 2485, has never denied another entity's application. Resp. Br. 1, 7, 14, 18. There is no record evidence to support that assertion, and in any event, this inquiry is not needed to establish that Texas law gives the Department sole control over messages on license plates.

If the respondents wish to explore propositions not reflected in the record, sources of that nature confirm that the Board has in fact denied both specialty and personalized plates. The Board has refused to approve one other specialty-plate application (a Texas DPS Troopers' Foundation plate), as demonstrated by a publicly available

transcript of a Board meeting.[1] And a news article reported that the Board denied over one percent of the roughly 43,000 personalized-plate applications it received in 2012, amounting to dozens of plate denials per month.[2]

Moreover, as the district court noted, an exhibit to the respondents' own motion for summary judgment confirms that the Board's predecessor (in the Texas Department of Transportation) denied a proposed pro-life specialty plate. Pet. App. 56a–57a; *see* USCA5 Record 278. The same predecessor also denied about a dozen other proposed specialty plates, according to internal Board documents not in the record. Texas is thus like the city in *Summum*, which also "regularly accept[ed]" privately proposed expression and at the same time "exercised selectivity" over the messages it wished to communicate. *Summum*, 555 U.S. at 471.

But the question of what plates have been denied in the past is a distraction. Even if the State had not denied a single license-plate application, what matters is that Texas law gives the Department sole control and the Board final approval authority to reject and disassociate from messages. *See supra* Part I.A; *cf.* Resp. Br. 18. To borrow an example from *Summum*, if the United States in its nascency had never rejected a monument offered by

---

[1] *See* Tr. of Tex. DMV Bd. Meeting, Aug. 9, 2012, at 112, http://www.txdmv.gov/reports-and-data/doc_download/450-2012-trans-aug9 (last visited March 11, 2015).

[2] Robert Arnold, *Texas Personal License Plates: What's Considered Road Worthy?*, KPRC TV 2 Houston, http://www.click2houston.com/news/Texas-personal-license-plates-What-s-considered-road-worthy/18441360 (last visited March 11, 2015).

a foreign country, that would not force the government to accept "Lady Autocracy" if such a statue were offered for display on federal property. 555 U.S. at 479. Perhaps if Texas actually had established a program under which the State served "only [as] a printer" of plates, such that any plate could contain whatever a motorist wanted, Resp. Br. 15, the outcome would be different. But that is not this case, as Texas has reserved sole control and final approval authority over all plates issued through its program.

b. The respondents also assert that the specific branch of government approving a license plate affects the constitutional analysis. According to them, plates approved by the Texas Legislature may be government speech, whereas agency-approved plates categorically are not. *See id.* at 13–14, 28–29. *Johanns* forecloses this argument; the message at issue there constituted government speech because it was approved by a *government agency*, the U.S. Department of Agriculture. 544 U.S. at 560–61; *see also Stop the Beach Renourishment, Inc. v. Fla. Dep't of Envtl. Prot.*, 560 U.S. 702, 715 (2010) (plurality op.) ("[T]he particular state actor [carrying out state action] is irrelevant."); *Mayor of Phila. v. Educ. Equal. League*, 415 U.S. 605, 615 n.13 (1974) ("[T]he Constitution does not impose on the States any particular plan for the distribution of governmental powers.").

By arguing that plates may be government speech only when they are approved by a State Legislature, the respondents are essentially asking the Court to require "a formal process of adopting . . . the message"—a proposal unanimously rejected in *Summum*. 555 U.S. at 473 (internal quotation marks omitted); *id.* at 485 (Souter, J., concurring in the judgment). But even if some type of "formal

process" were required, Texas would meet the test. The Department provides notice and comment for new specialty plates, 43 Tex. Admin. Code §§ 217.28(i)(6), 217.40(d)(2), and the Board exercises its "[f]inal approval" authority by voting to "approve or disapprove" a plate proposal at "an open meeting," *id.* §§ 217.28(i)(7), 217.40(e).

Furthermore, the Texas Legislature delegated sole control over license-plate design to the Department, so the branch-of-government distinction is not as sharp as the respondents intimate. Legislature-approved plates are designed by the Department—often in conjunction with private sponsors, just like agency-approved plates. *See, e.g.*, Tex. Transp. Code § 504.608 ("The department shall design [Mothers Against Drunk Driving] license plates in consultation with Mothers Against Drunk Driving."). Regardless, Texas maintains sole control over the messages that appear on its license plates both when the Legislature has required the creation of a plate and when it has not.

C. The Respondents' And Amici's Efforts To Avoid The Government-Speech Doctrine Fail

1. The government-speech doctrine, of course, may not "be used as a subterfuge" for favoring some private speakers' points of view over others. *Summum*, 555 U.S. at 473; *see* Choose Life Br. 8; FIRE Br. 8; ACLU Br. 10 n.6; Becket Fund Br. 1–2; Children First Br. 10–11; ACLJ Br. 6–8. The Free Speech Clause therefore would generally prohibit laws decreeing that only government can speak in a traditional public forum for private speech—or that government is the only speaker that can address certain content or viewpoints in a traditional or designated

public forum for private speech. *Cf. Rust*, 500 U.S. at 200 (noting that government subsidization of speech "does not justify the restriction of speech in areas that have been traditionally open to the public for expressive activity or have been expressly dedicated to speech activity") (internal quotation marks and citation omitted).

But Texas, like the city in *Summum*, has made no such effort to abridge "traditional free speech rights." 555 U.S. at 474; *see id.* at 484 (Breyer, J., concurring) (noting that the city did not "disproportionately restrict Summum's freedom of expression" in light of its legitimate governmental objective). Texas, rather, has communicated state-approved messages through an additional, particular medium over which the State has consistently maintained sole control. Texas's license-plate program allows motorists to transmit State-controlled messages. As in *Summum*, 555 U.S. at 474, and *Rust*, 500 U.S. at 198–99, the State's control over specialty license plates in no way limits its citizens' ability to convey messages rejected by the State in any number of other ways. The respondents do not dispute that there are ample alternative channels for speech on their vehicles alone—from bumper stickers and license-plate holders to window decals and paint jobs. The only difference between these channels and the specialty plate sought by the respondents is whether the State's imprimatur is given to the message.

2. The respondents mistakenly describe Texas's license-plate program as a forum for private speech. Resp. Br. 30. Far from demonstrating "clear [governmental] intent to create a public forum," *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 270 (1988) (internal quotation marks omitted); *see* Ohio Br. 22–24, the relevant statutory

provisions and the nature of the program evince the opposite intent.

First, the State maintains control over the messages transmitted on specialty plates, *see supra* Part I.A.2, and it has exercised selectivity about which plates to allow, *see supra* Part I.B.2.a—the antithesis of a forum for private speech. *See* Justice and Freedom Fund Br. 13 ("In other contexts, the government exercises an editorial function without incurring a constitutional obligation to open a public forum[.]") (citing *United States v. Am. Library Ass'n*, 539 U.S. 194 (2003); *Nat'l Endowment for the Arts v. Finley*, 524 U.S. 569 (1998); *Ark. Educ. Television Comm'n v. Forbes*, 523 U.S. 666 (1998)). That Texas has approved many plates does not negate its control. It merely illustrates the diverse array of interests the State is willing to showcase. *See* Gaylord, *supra*, at 143–51. For that reason, the respondents' reliance on *Legal Services Corp.*, which involved a program "designed to facilitate private speech" in connection with claims "against the government," 531 U.S. at 542, is misplaced. *See* Resp. Br. 24.

Nor does the State relinquish sole control of the messages on license plates if one of its motives for speaking is to generate revenue. Berger Br. 15–16; *cf.* Resp. Br. 19. Concerns about the pecuniary implications of one's speech are not unusual. Those concerns motivate the extent of speech by store owners selling products, professionals selling their services, and countless other speakers. Speakers' motives, additionally, are often multifaceted, if knowable at all. *See Summum*, 555 U.S. at 474–76.

Second, the license-plate program is not a private speech forum for precisely the same reason that a public

park is not a forum with respect to monuments: applying forum analysis would "defeat[] the essential function of the . . . program." *Id.* at 478. License-plate programs allow States to propagate messages and raise revenue through voluntary payments from their citizens while providing those citizens a means of promoting state speech. *See* Resp. Br. 19 n.24 (correctly noting that a portion of the revenue generated by the sale of Texas specialty license plates is deposited into the State's general revenue fund for the benefit of a specific state agency, or, if the plate sponsor did not nominate an agency to receive the funds, into a separate state fund used to support the Department's operations, *see* Tex. Transp. Code § 504.801(e)).

If States are not free to reject demands to place their imprimatur on controversial messages, it may be difficult for them to maintain specialty- and personalized-plate programs. *See Forbes*, 523 U.S. at 681 ("Were it faced with the prospect of cacophony, on the one hand, and First Amendment liability, on the other, a public television broadcaster might choose not to air candidates' views at all. A broadcaster might decide the safe course is to avoid controversy . . . .") (internal quotation marks omitted). States will recoil from the prospect of placing their names next to messages amplifying al Qaeda or the Nazi party. *See* Pet. Br. 41–46; Ohio Br. 7–11 (noting the specialty-plate messages that various States have authorized and voicing the type of "well founded" concerns that the Court acknowledged in *Summum*, 555 U.S. at 479). The respondents have no answer to this.

Moreover, it is beside the point whether many people would want controversial plates, as even a few could render the program unworkable. And the steady stream of

personalized plates that any State's program inevitably rejects, *see, e.g.*, *supra* Part I.B.2.a, illustrates that there is a significant demand for license plates with crude, profane, or otherwise objectionable content. Few if any States would be willing to stamp these messages with their seals of approval and etch them onto their license plates. And a similar fate could befall other government-speech programs that utilize private input, such as those for U.S. postage stamps[3] and Adopt-a-Highway signs.[4]

3. Finally, the fact that speech on specialty license plates is government speech means that other constitutional restraints apply, such as those imposed by the Establishment Clause and the Equal Protection Clause. *Summum*, 555 U.S. at 468; *see* Pet. Br. 39 n.6. But contrary to the assertions of amicus Americans United for Separation of Church and State (at 6–12), Texas's argument is not inconsistent with positions it has taken in previous Establishment Clause cases.

In *Santa Fe Independent School District v. Doe*, Texas's amicus brief in this Court argued that the school district lacked sufficient control over the speech at issue for that speech to be attributed to the State. Brief of Amicus Curiae State of Texas, et al. at 5–9, *Santa Fe ISD v. Doe*, 530 U.S. 290 (Dec. 30, 1999) (No. 99-62), 1999 WL

---

[3] *See* 39 U.S.C. § 416; 39 C.F.R. §§ 551.1–551.8; U.S. Postal Serv., *The Stamp Selection Process*, https://about.usps.com/who-we-are/csac/process.htm (last visited March 11, 2015).

[4] *See* 43 Tex. Admin. Code § 12.3; Texas Dep't of Transp., *Adopt-a-Highway*, http://txdot.gov/inside-txdot/get-involved/volunteer/adopt-a-highway.html (last visited March 11, 2015).

1272942. The Court disagreed, concluding that an invocation "authorized by a government policy and tak[ing] place on government property" could not be regarded as private speech, 530 U.S. at 302—even though the message was "selected or created by [the] student," *id.* at 324 (Rehnquist, C.J., dissenting). *See* Ohio Br. 25. Regardless, Texas maintains far more control over the speech in its license-plate program, so there is nothing inconsistent about its position in this case.

And in *Schultz v. Medina Valley Independent School District*, Texas's amicus brief in the Fifth Circuit pointed out that the school district exercised substantially less control over student speech than the policies at issue in *Santa Fe* and *Lee v. Weisman*, 505 U.S. 577 (1992). Brief of the State of Texas as Amicus Curiae at 4–5, *Schultz v. Medina Valley ISD*, No. 11-50486 (5th Cir. June 2, 2011). The court of appeals agreed. Order at 1, *Schultz*, No. 11-50486 (5th Cir. June 3, 2011) ("[W]e are not persuaded that plaintiffs have shown . . . that the individual prayers or other remarks to be given by students at graduation are, in fact, school-sponsored."); *cf. Town of Greece v. Galloway*, 134 S. Ct. 1811, 1816 (2014) ("Greece neither reviewed the prayers in advance of the meetings nor provided guidance as to their tone or content").

D. The Respondents Cannot Compel The State To Speak

1. The respondents have any number of similar (or better) avenues for expressing their message. Their insistence on forcing Texas to issue a specialty plate featuring the confederate battle flag demonstrates what this lawsuit is really about: compelling Texas to lend its imprimatur to

a message that Texas does not wish to convey. But the respondents do not contest that States, like private citizens, are free to disassociate from messages. Pet. Br. 25–27; *see Rust*, 500 U.S. at 192 (government is entitled to "make a value judgment" supporting certain speech without providing similar assistance with respect to alternative viewpoints) (internal quotation mark omitted).

The respondents misunderstand *Wooley v. Maynard*, 430 U.S. 705 (1977), which turned precisely on the fact that the motorist was being forced to display the State's message. *Cf.* Resp. Br. 25–27. *Wooley* specifically recognized that license plates serve as "mobile billboard[s] for the State's . . . message," in that they provide a platform for "[t]he State . . . to communicate to others an official view" regarding topics of state interest. 430 U.S. at 715–17; *see supra* p. 5 (noting the respondents' and amici's concession that legislatively approved specialty plates may constitute government speech). That a specialty license plate may also convey a motorist's endorsement of the message does not change the fact that the government is speaking when it issues the plate as part of a state-operated program within its sole control. *See Summum*, 555 U.S. at 464–65 (concluding that a privately donated Ten Commandments monument was government speech even though it featured the Fraternal Order of Eagles' name).

The correct approach is to recognize that neither the State nor the motorist can force the other to promote a message. That approach respects both the State's prerogative to "select the views that it wants to express" through a license-plate program, *id.* at 468, and the private individual's right not to disseminate the State's chosen mes-

sages, *Wooley*, 430 U.S. at 717. In no way does *Wooley* provide motorists with a right "to speak . . . on their license plates," Resp. Br. 26, that trumps the State's right to choose the messages it wishes to communicate and promote. Put differently, license-plate speech cannot occur without both Texas's approval of the message and the motorist's cooperation and consent.

2. Besides depending on extra-record information not properly subject to judicial notice, *see* Fed. R. Evid. 201(b), the respondents' digression into Texas's alleged endorsement of the Confederacy, Resp. Br. 1, 6, 10–12, 33–34, 39, is both irrelevant and misleading.

The "miniature Confederate flags" sold in the Texas Capitol gift shop, Resp. Br. 1, are replicas of the first national flag of the Confederacy, which does not contain the St. Andrew's Cross that makes the confederate battle flag a forceful symbol in the minds of many Americans, *see* Pet. App. 55a & n.2. Like the monuments and other confederate references that the respondents identify, the miniature confederate national flags (which are sold in sets that include the five other flags that at one point flew over Texas) acknowledge the Confederacy's existence in Texas history.[5]

Furthermore, the respondents cannot compel Texas to speak in any particular medium. Texas's decision to place monuments to fallen soldiers on the Capitol grounds, for example, does not oblige it to place similar messages on billboards. The respondents' approach would embroil

---

[5] *See* Texas Capitol Gift Shop, Six Flags Over Texas Desk Set, http://www.texascapitolgiftshop.com/Six-Flags-Over-Texas-Desk-Set-P253.aspx (last visited March 11, 2015).

courts in disputes that could be resolved only through conceptually incoherent inquiries into what States truly believe about specific matters. Texas should not be forced to associate itself with the confederate battle flag on its license plates.

II. THE BOARD DID NOT ENGAGE IN VIEWPOINT DISCRIMINATION

The respondents do not argue that Texas's license-plate program is anything more than a non-public forum that the State may limit to "certain groups or . . . subjects," *Summum*, 555 U.S. at 470. *See* Resp. Br. 30–36. Restrictions on speech in a non-public (or "limited") forum need only be reasonable and viewpoint neutral. *Summum*, 555 U.S. at 470. Thus, even assuming arguendo that the license-plate program is a non-public forum for private speech, the respondents are wrong to suggest (Resp. Br. 36–37) that the analysis here is guided by *Snyder v. Phelps*, 131 S. Ct. 1207 (2011), and *Simon & Schuster, Inc. v. Members of the New York State Crime Victims Board*, 502 U.S. 105 (1991). Those cases did not involve non-public forums. *Snyder*, 131 S. Ct. at 1218 (public streets); *Simon & Schuster*, 502 U.S. at 116 (books).

In denying the respondents' specialty-plate application, Texas did not discriminate on account of viewpoint. Like the State in *Choose Life Illinois, Inc. v. White*, 547 F.3d 853, 865 (7th Cir. 2008)—which denied a pro-life plate without issuing a pro-choice plate—Texas has not entered the "debate" regarding the proper understanding or significance of the confederate battle flag. *Cf. United States v. Kokinda*, 497 U.S. 720, 726 (1990) (plurality op.) (noting that *Lehman*, 418 U.S. at 304 (plurality op.), found no

First Amendment violation when a city limited advertising space on city-owned buses to "less controversial" topics). The Board merely concluded that some members of the public might be offended by the respondents' use of the flag and denied the application for that reason. Pet. App. 69a; *see also Perry v. McDonald*, 280 F.3d 159, 169–71 (2d Cir. 2001) (concluding that Vermont's revocation of a personalized (or "vanity") plate based on offensiveness amounted to lawful content discrimination). The State never expressed its own view on the subject or approved responsive viewpoints.

The respondents mischaracterize *White* as holding that excluding depictions of the confederate battle flag necessarily constitutes viewpoint discrimination. *See* Resp. Br. 36. In commenting on the confederate battle flag, *White* was analyzing a case in which the Sons of Confederate Veterans was allowed to have a specialty plate, just not one featuring the confederate battle flag. *See White*, 547 F.3d at 865 (discussing *Sons of Confederate Veterans, Inc. v. Comm'r of Va. Dep't of Motor Vehicles*, 288 F.3d 610, 613 (4th Cir. 2002)).

Finally, the respondents argue that the State has failed to adduce evidence demonstrating that "the entire 'issue' raised by the [respondents]" has been excluded from the program. Resp. Br. 35. That has it backwards. Even assuming license plates have been opened up as a non-public forum (and they have not), the State has reserved final approval authority over all plate messages, and no speech may occur without its permission. The burden therefore falls on the respondents to identify evidence that Texas has allowed opposing viewpoints on the subject, and the respondents have not met that burden.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

KEN PAXTON
Attorney General of Texas

CHARLES E. ROY
First Assistant
Attorney General

OFFICE OF THE
ATTORNEY GENERAL
P.O. Box 12548 (MC 059)
Austin, Texas 78711-2548
scott.keller@
texasattorneygeneral.gov
(512) 936-1700

SCOTT A. KELLER
Solicitor General
Counsel of Record

J. CAMPBELL BARKER
Deputy Solicitor General

BILL DAVIS
EVAN S. GREENE
ALEX POTAPOV
Assistant Solicitors General

ERIKA M. KANE
Assistant Attorney General

March 2015